

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

Affidavit
75-6099

To be argued by
SAMUEL J. WILSON

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-6099

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

MILTON BLACKSTONE,

Defendant-Appellant,

LIBERTY REGISTER PUBLISHING CORPORATION, TISHMAN
REALTY AND CONSTRUCTION COMPANY, INC., SULLIVAN
COUNTY NATIONAL BANK, BLACKSTONE MUSIC, INC.,
F. C. O'KEEFE, PEC ISRAEL ECONOMIC CORPORATION,
SULLIVAN COUNTY HARNESS RACING ASSOCIATION,
INC.,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLEE

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York
Attorney for Plaintiff-Appellee*

SAMUEL J. WILSON,
*Assistant United States Attorney,
Of Counsel.*

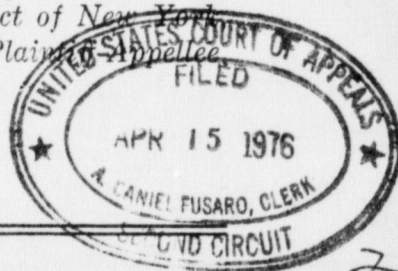




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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-6099

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Plaintiff-Appellee,

—v.—

MILTON BLACKSTONE,

Defendant-Appellant,

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REALTY AND CONSTRUCTION COMPANY, INC., SULLIVAN
COUNTY NATIONAL BANK, BLACKSTONE MUSIC, INC.,
F. C. O'KEEFE, PEC ISRAEL ECONOMIC CORPORATION,
SULLIVAN COUNTY HARNESS RACING ASSOCIATION,
INC.,

Defendants.

BRIEF FOR PLAINTIFF-APPELLEE

Preliminary Statement

This is an appeal from an order of the Honorable Constance Baker Motley, United States District Judge, dated September 15, 1975, denying appellant Milton Blackstone's motion to set aside a prior order of the Court, filed June 19, 1975, granting plaintiff's motion for partial summary judgment.

Statement of Facts

On January 14, 1972, the United States commenced this action by the filing of a complaint seeking judgment for income taxes due from defendant Milton Blackstone for the years 1958 through 1962. It also sought to foreclose tax liens for those years against certain property of defendant Blackstone held by seven other named defendants.

Defendant Blackstone was served with the summons and complaint on March 17, 1972. Thereafter, defendant Blackstone requested and signed a number of stipulations extending his time to answer the complaint. These stipulations were "so ordered" by various judges of the district court. Finally, Judge Motley "so ordered" a stipulation filed December 13, 1972, extending defendant Blackstone's time to answer to January 15, 1973 and directing that no further extensions of time to answer were to be granted.

By February, 1975, defendant Blackstone had not yet answered the complaint. On February 6, 1975, the Government served and filed a motion for partial summary judgment against defendant Blackstone for taxes due for the years 1958, 1959, 1961 and 1962.* The motion was made returnable February 19, 1975.

Thereafter, at the request of Helen Sperber, Esq., appearing for defendant Blackstone only for purposes of obtaining an extension of his time to answer the Government's motion for partial summary judgment, the Court granted defendant Blackstone until May 20, 1975 to reply and stated that no further extensions would be

* The motion was supported by affidavit and in absence of a sufficient appendix on this *pro se* appeal is reproduced in an Addenda hereto at pages A-1 through A-8.

granted. Ms. Sperber's affidavit in support of her application annexed a doctor's letter advising that Mr. Blackstone was convalescing from surgery.* On June 18, 1975, having received no reply papers from defendant Blackstone, Judge Motley endorsed the Government's partial summary judgment papers granting the unopposed motion. This order was filed the following day, June 19, 1975.

Thereafter, on July 11, 1975, the Court entered an order denying the motion of defendant Blackstone to set aside its order granting partial summary judgment against him. This order further provided that if defendant Blackstone submitted, within thirty days of its entry, papers demonstrating a meritorious defense the Court would reconsider its denial of his motion.

On August 11, 1975, defendant Blackstone filed an affidavit in support of his motion to set aside the Court's order granting the Government partial summary judgment.** In his affidavit, Blackstone asserted that he had been ill and unable to respond to the Government's motion. He also referred to the fact that for the years 1959, 1960, 1961 and 1962 his tax returns as he filed them showed that he was due a refund, which fact he asserted disproved his tax liability for those years. As to the tax year 1958, for which the Government's motion for summary judgment relied upon the res judicata effect of a Tax Court decision consented to by defendant Blackstone's representative authorized by written power of attorney, Blackstone's affidavit asserted that the Tax Court petition had not been verified by him and any such judgment was invalid.

* This affidavit and exhibit are reproduced at Addenda pages A-9 through A-11.

** This affidavit appears at Addenda pages A-12 through A-15.

On September 15, 1975, Judge Motley signed and filed an endorsement upon Blackstone's affidavit in support of the motion to set aside the judgment. The Court concluded that defendant had "not set forth a meritorious defense such as would justify setting aside the prior order of this court of June 18, 1975, granting partial summary judgment. The motion of defendant to set aside that order is therefore denied." On September 30, 1975, defendant Blackstone filed a notice of appeal from "the decision rendered . . . September 15, 1975." No judgment has been entered by the District Court in this action.

A R G U M E N T

POINT I

The Court lacks jurisdiction of this appeal.

The order of September 15, 1975, from which defendant has taken this appeal, is not an appealable order. That order denied defendant's application to set aside the order entered by the Court on June 19, 1975, which granted plaintiff's application for partial summary judgment against defendant. The September 15 order is not appealable because the June 19 order to which it relates is neither final nor appealable.

Pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, a judgment of order which disposes of less than all claims or all claims against less than all parties is non-final and subject to revision by the District Court at any time before entry of a judgment adjudicating the matter in its entirety, unless the court certifies that there is no just reason for delay in entry of a partial judgment and directs entry of such a judgment. An order entered without such a certification is therefore not appealable. *Allis-Chalmers Corp. v. Philadelphia Electric Co.*, 521 F.2d 360, 362 (3d Cir. 1975); *Campbell v. Westmoreland*

Farm, Inc., 403 F.2d 939, 940 (2d Cir. 1968); *Wolfson v. Blumberg*, 340 F.2d 89 (2d Cir. 1965); *Backus Plywood Corp. v. Commercial Decal, Inc.*, 317 F.2d 339 (2d Cir.), *cert. denied*, 375 U.S. 879, 84 S. Ct. 146, 11 L. Ed. 2d 110 (1963).

The District Court's order of June 19, 1975, granting plaintiff's motion for partial summary judgment concerning four of the five tax years in issue between plaintiff and defendant Blackstone does not contain a Rule 54(b) certification and direction and for that reason is non-final and not appealable. Such a certification and direction would be required for finality both because of the remaining issue concerning the tax year 1960 and because of the claims of the plaintiff against the remaining defendants.

The denial of defendant's application for relief from the Court's order of September 15, could be treated as the denial of a motion under Rule 60(b) of the Federal Rules of Civil Procedure, had there been a Rule 54(b) certification and direction in the District Court's order of June 19. 7 J. Moore, *Federal Practice*, ¶ 60.20. Such an order would be subject to review by this Court. However, Rule 60(b) can have no application to the order of September 15 from which plaintiff took this appeal because it applies only to requests for relief from a "final judgment, order, or proceeding" Rule 60, F.R.Civ.P. [emphasis added]. 7 J. Moore, *Federal Practice*, ¶ 60.20. As demonstrated above, the order of June 19 from which defendant sought relief is a non-final order. Therefore, the order of September 15, 1975 is an interlocutory order not currently subject to review in this court under 28 U.S.C. § 1291.

Where, as here, finality is a prerequisite to appealability and a Rule 54(b) certification and direction is necessary for finality, the general practice is to dismiss the appeal without prejudice to its renewal upon a proper certification and direction by the District Court. *TMA*

Fund, Inc. v. Biever, 520 F.2d 639, 641-42 (3d Cir. 1975); *Wolfson v. Blumberg*, 340 F.2d 89 (2d Cir. 1965); *Republic of China v. American Express Co., Inc.*, 190 F.2d 334 (2d Cir. 1951); *Lyman v. Remington Rand, Inc.*, 188 F.2d 306 (2d Cir. 1951); *Tobin Packing Co., Inc. v. North American Car Corp.*, 188 F.2d 158 (2d Cir. 1951).

POINT II

The order appealed from was not an abuse of the Court's discretion.

Even if this Court were to determine that it had jurisdiction over this appeal, contrary to the foregoing argument, the order of the District Court must be affirmed. A motion to vacate a judgment, whether under Rule 55(c) or Rule 60(b) of the Federal Rules of Civil Procedure, is addressed to the sound discretion of the trial court and, absent an abuse of such discretion, the District Court's determination will not be disturbed on appeal. *Daily Mirror, Inc. v. New York News, Inc.*, — F.2d — (2d Cir. April 1, 1976) (Slip opin. p. 2877); *Altman v. Connally*, 456 F.2d 1114, 1116 (2d Cir. 1972); *Sampson v. Radio Corp. of America*, 434 F.2d 315, 317 (2d Cir. 1970); *Hines v. Seaboard Air Line R.R. Co.*, 341 F.2d 229 (2d Cir. 1965).

As this Court stated in *Daily Mirror, Inc. v. New York News, Inc.*, *supra*, appeal of an order denying relief under Rule 60(b) "does not permit the appellant to attack the underlying judgment for error that could have been complained of on direct appeal."

The history of this action demonstrates that the District Court was correct in denying defendant's application to set aside its order granting partial summary judgment against him. The complaint was filed in January, 1972 and served upon defendant Blackstone on

March 17, 1972. Despite his awareness of the need for an answer, as demonstrated by his obtaining a number of stipulations extending his time to answer, defendant Blackstone never answered the complaint. When served with plaintiff's partial summary judgment papers defendant appeared by counsel to request an adjournment of the motion for reasons of health. The District Court granted the defendant's request to the extent of a three month adjournment. No responsive papers were filed by the defendant. The Court did not act upon the plaintiff's motion for almost an additional month. Still, no responsive papers were filed by the defendant. Finally, the Court granted the partial summary judgment plaintiff sought.

The Court then offered defendant an additional month to file papers demonstrating a meritorious defense to persuade it to set aside its order. In response the defendant filed a conclusory affidavit. He denied that he owed any taxes for the years in suit and asserted that he had records to prove this. The only relevant documents attached to his affidavit were his tax returns for the years 1958, 1959, 1960, 1961 and 1962. The affidavit asserts that since his returns for 1959, 1960, 1961 and 1962, as he filed them, showed that he was due a refund, there could be no tax liability on his part. The moving papers had relied upon a consent decree entered in the Tax Court for the year 1958. The defendant's affidavit claimed that the Tax Court consent decree was entered without his authorization but he did not explain the existence of a power of attorney, made an exhibit to the Government's moving papers, authorizing counsel of record in the Tax Court to appear for him.

The conclusory affidavit was clearly insufficient to require the District Court to set aside its order under Rule 60(b). See *Gomes v. Williams*, 420 F.2d 1364 (10th

Cir. 1970). This is particularly true in a case such as this where the burden is on the defendant-taxpayer to overcome the presumption of regularity of the tax assessment. See *Lesser v. United States*, 368 F.2d 306, 310 (2d Cir. 1966) (en banc); *United States v. Lease*, 346 F.2d 696, 700 (2d Cir. 1965). Therefore, it was not an abuse of the discretion of the District Court for that Court to deny defendant's motion to set aside its order and the order appealed from should be affirmed.

CONCLUSION

For the foregoing reasons, this appeal should be dismissed for lack of jurisdiction or the order of the District Court should be affirmed.

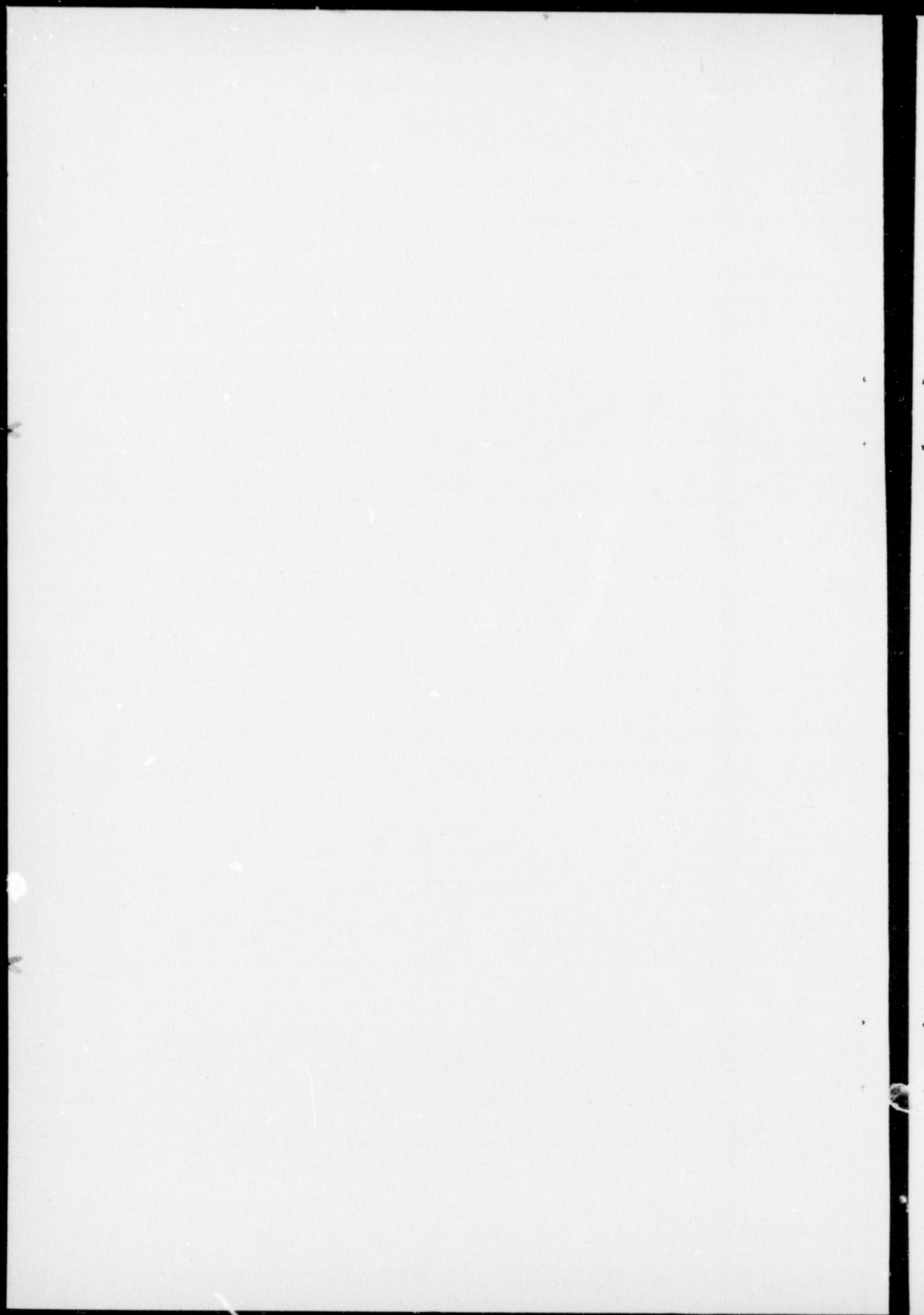
Dated: April 14, 1976
New York, New York

Respectfully submitted,

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for Plaintiff-Appellee.*

SAMUEL J. WILSON,
*Assistant United States Attorney,
Of Counsel.*

ADDENDA



SOUTHERN DISTRICT OF NEW YORK

72 Civ. 192 (CBM)

UNITED STATES OF AMERICA,

Plaintiff,

—v.—

MILTON BLACKSTONE, et al.,

Defendants.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:
SOUTHERN DISTRICT OF NEW YORK)

SAMUEL J. WILSON, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the office of Paul J. Curran, United States Attorney for the Southern District of New York and attorney for the plaintiff herein.

2. I make this affidavit upon information and belief based on official records of the United States provided to me in connection with the prosecution of this action and in support of plaintiff's motion for partial summary judgment against defendant Milton Blackstone, hereinafter sometimes referred to as "defendant taxpayer" or "taxpayer."

3. Plaintiff commenced this action to declare defendant Blackstone's indebtedness to the plaintiff and to fore-

Affidavit of Samuel J. Wilson, in Support of Motion

close its tax liens against certain property owned by him and held by the other named defendants. The complaint was filed on January 14, 1972.

4. Defendant Sullivan County Harness Racing Association, Inc., served its answer upon plaintiff's counsel on April 11, 1972. In its answer it admitted that the defendant taxpayer is the registered owner of 500 shares of its Class A stock.

5. Defendant Sullivan County National Bank, in its answer dated April 12, 1972, admitted that it held a checking account in the amount of \$4,807.22 in the name of the Liberty Register Publishing Corporation and requested that the Court determine whether these funds belonged to the defendant taxpayer.

6. Defendants Blackstone Music, Inc., and F. C. O'Keefe served a joint answer upon plaintiff's counsel on April 25, 1972, in which they alleged that the defendant taxpayer is the beneficial owner of 50% of the stock of Blackstone Music, Inc., and F. C. O'Keefe is the beneficial owner of the remaining 50% of the stock of said corporation, while said F. C. O'Keefe is the only stockholder of record of Blackstone Music, Inc.

7. On April 24, 1972, defendant Tishman Realty & Construction Co., Inc. served its answer upon plaintiff's counsel, in which it admitted that it held 20 shares of Liberty Register Publishing Corporation stock issued to defendant taxpayer and allegedly pledged by him as collateral security for a debt he owed to defendant Tishman in connection with the purchase of a cooperative apartment. Defendant Tishman alleges an interest in the shares by reason of defendant taxpayer's default upon the principle obligation and claims that this interest is superior to the liens of the plaintiff on these shares.

Affidavit of Samuel J. Wilson, in Support of Motion

8. On March 17, 1972, defendant-taxpayer, Milton Blackstone, was served with the summons and complaint in this action by the United States Marshal for the Southern District of New York. He was served in his individual capacity and in his capacities as President of Liberty Register Publishing Corporation and President of Blackstone Music, Inc.

9. Based upon numerous conversations with defendant taxpayer regarding this case since the filing of the complaint, I became convinced that he was suffering from mental and physical problems I was not qualified to diagnose but which would make it impossible for him to adequately defend himself in this matter. (See Exhibit 1 attached for additional support of this belief.) Therefore, I acceded to numerous requests for extensions of his time to answer in the hope and expectation that defendant taxpayer would carry out his stated intention to retain counsel to assist him.

10. On December 13, 1974, defendant taxpayer called me to advise that he was going to be represented in this matter by Helen Sperber, Esq., 11 West 42nd Street, New York, New York.

11. I spoke with Helen Sperber, Esq., by telephone on January 22, 1975 and was advised by her that she had not yet agreed to represent Mr. Blackstone in this matter although she was considering it.

12. To the present date, defendant taxpayer and defendant Liberty Register Publishing Corporation have not answered the complaint or otherwise responded thereto, nor is there any record of an appearance of counsel on behalf of either.

Affidavit of Samuel J. Wilson, in Support of Motion

13. This suit arises out of deficiencies in defendant taxpayer's income tax payments for the tax years ending December 31, 1958, 1959, 1960, 1961 and 1962.

14. On or about October 15, 1959, Milton Blackstone filed his income tax return for calendar year 1958, prepared by Victor Zelman & Co., Certified Public Accountants, 350 Fifth Avenue, New York, New York.

15. On or about December 19, 1961 and on January 17, 1963, the taxpayer executed extensions of time, ultimately expiring on December 31, 1963, for the assessment of deficiencies in his income tax for the year 1958. (True copies of these extensions are annexed hereto as Exhibits 2 and 2A.)

16. By letter dated December 13, 1963, the Internal Revenue Service notified Milton Blackstone, c/o Victor Zelman, Esq., Suite 7021, 350 Fifth Avenue, New York, New York, that a deficiency of \$20,244.78 existed in his tax payment for the year ending December 31, 1958. (A true copy of this letter is annexed hereto as Exhibit 3.)

17. On March 12, 1964 the taxpayer's attorney, Maurice S. Spanbock, filed a petition with the Tax Court seeking redetermination of the deficiency found by the Internal Revenue Service. (A true copy of this petition is annexed hereto as Exhibit 4.)

18. By power of attorney dated August 11, 1965 defendant taxpayer appointed Isaac E. Okun, Certified Public Accountant, to represent him in regard to proposed additional tax assessments for the year 1958 and revoked all prior powers of attorney. (A true copy of this power of attorney is annexed hereto as Exhibit 5.)

Affidavit of Samuel J. Wilson, in Support of Motion

19. By power of attorney dated October 8, 1965 defendant taxpayer appointed Isaac E. Okun, Certified Public Accountant, to represent him in regard to proposed additional tax assessments for the years 1959, 1960, 1961 and 1962. (A true copy is annexed hereto as Exhibit 6.)

20. On November 8, 1965, Isaac E. Okun, C.P.A., of 250 West 57th Street, New York, New York, filed an appearance on behalf of petitioner Milton Blackstone in Tax Court, Docket Number 973-64. (A true copy is annexed hereto as Exhibit 7.) Thereafter, on December 10, 1965, on consent of the parties the Court entered a decision finding a deficiency in petitioner's income tax for the tax year 1958 of \$14,171.35. (A true copy of the Tax Court decision is annexed hereto as Exhibit 8.)

21. On January 14, 1966, a tax deficiency for the tax year 1958 in the amount of \$14,171.35 was assessed against Milton Blackstone plus interest in the amount of \$5,726.78 and Milton Blackstone was sent a notice of the assessment and demand for payment on that date. A true copy of the statement of the taxpayer's Internal Revenue account is annexed hereto as Exhibit 9 and reflects the making of this assessment and the mailing of the notice and demand.

22. Between June 8, 1966 and March 21, 1968 the Internal Revenue Service received from the taxpayer four payments in the amounts of \$645.20, \$5.19, \$25.33, \$4,450.00. (See Exhibit 9.)

23. On or about June 10, 1960, Milton Blackstone filed his income tax return for calendar year 1959, prepared by Victor Zelman, 350 5th Avenue, New York, New York.

Affidavit of Samuel J. Wilson, in Support of Motion

24. On or about April 1, 1963, Milton Blackstone consented to an extension to June 30, 1964 of the time to assess income taxes for the tax year ending December 31, 1959. Thereafter, on or about March 10, 1964 Mr. Blackstone consented to a further extension to June 30, 1965, on or about March 25, 1965 a further extension to June 30, 1966, and finally on or about April 6, 1966 an extension to June 30, 1967. (True copies are annexed hereto as Exhibits 10, 11, 12 and 13 respectively.)

25. On September 2, 1966 a tax deficiency in the amount of \$9,719.27 was assessed against Milton Blackstone for the taxable year 1959 plus interest in the amount of \$3,668.68 and the taxpayer was sent notice of the assessment and demand for payment. (Exhibit 9 reflects the making of the assessment and mailing of the notice of assessment and demand for payment.)

26. On or about October 15, 1962, Milton Blackstone filed his income tax return for calendar year 1961, prepared by Victor Zelman & Co., Certified Public Accountants, 350 Fifth Avenue, New York, New York.

27. On March 25, 1965 the Internal Revenue Service received from Milton Blackstone his consent to the extension to June 30, 1966 of the time within which to assess income taxes due for the tax year ended December 31, 1961. Thereafter, on April 6, 1966, the Internal Revenue Service received from Mr. Blackstone consent to a further extension to June 30, 1967. (True copies of these extensions are annexed hereto as Exhibits 14 and 15 respectively.)

28. On September 2, 1966 a deficiency in income tax for the year 1961 was assessed against the defendant taxpayer in the amount of \$5,217.52 plus interest in the

Affidavit of Samuel J. Wilson, in Support of Motion

amount of \$1,343.33 and on that date notice of the assessment was mailed to the defendant taxpayers. (The assessment and the mailing of notice and demand is reflected on Exhibit 9.)

29. On or about April 6, 1966, the Internal Revenue Service received from Milton Blackstone his consent to the extension to June 30, 1967 of the time within which to assess income tax due for the tax year ended December 31, 1962. (A true copy is annexed hereto as Exhibit 16.)

30. On September 2, 1966, a deficiency in income tax for the tax year ending December 31, 1962 was assessed against the defendant taxpayer in the amount of \$4,494.74 plus interest in the amount of \$887.55 and notice of the assessment and demand for payment was mailed to the taxpayer. (The making of this assessment and the mailing of notice of the assessment and demand for payment is reflected on Exhibit 9A.)

31. In or about June, 1966, defendant-taxpayer executed a form 870 by which he consented to the assessment and collection, without prior notice of deficiency, of tax deficiencies together with interest provided by law and accepted the following assessments as correct:

<i>Type of Tax</i>	<i>Year Ended</i>	<i>Tax Deficiency</i>
Income	12/31/59	\$ 9,719.27
Income	12/31/61	\$ 5,217.52
Income	12/31/62	\$ 4,494.74
		<u>\$19,431.53</u>

These agreed to deficiencies were the amounts thereafter assessed for each of these tax years as reflected in paragraphs 21, 25 and 28 above. (A true copy of the form

Affidavit of Samuel J. Wilson, in Support of Motion

870 executed by the taxpayer is annexed hereto as Exhibit 17.)

WHEREFORE, your deponent respectfully prays that this Court grant plaintiff's motion for partial summary judgment and enter a money judgment against defendant Milton Blackstone in the amount of \$40,103.50 plus accrued statutory interest and costs in favor of the United States.

SAMUEL J. WILSON
Assistant United States Attorney

Sworn to before me this
6th day of February, 1975.

WALTER G. BRANNON
Notary Public, State of New York
No. 24-0394500
Qualified in Kings County
Cert. filed in New York County
Term Expires March 30, 1975

Affidavit of Helen Sperber, in Opposition to Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 Civ. 192 (CBM)

UNITED STATES OF AMERICA,

Plaintiff,

—against—

MILTON BLACKSTONE, et al.,

Defendants.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

HELEN SPERBER, being duly sworn, deposes and says:

That she is an attorney-at-law and is appearing for defendant, Milton Blackstone, at this time solely for the purpose of the application to the Court to extend the time of said defendant to appear in opposition to the motion for summary judgment by the plaintiff.

The reason your deponent limits her appearance to a restricted one, as stated above, is that Mr. Blackstone has been seriously ill and has been unable to confer personally with your deponent respecting the substantive aspects of the plaintiff's cause of action. Attached hereto is a statement attesting to the serious illness of Mr. Blackstone by William M. Hitzig, M.D., dated March 12th, 1975.

It is respectfully suggested at this time that Mr. Blackstone be granted a two months extension of time to oppose the aforesaid motion for summary judgment.

Affidavit of Helen Sperber, in Opposition to Motion

It is further respectfully urged that the plaintiff would suffer no prejudice by such extension. Your deponent is of the belief that the plaintiff, subject to the Court's approval, would be willing to agree to such extension of time.

HELEN SPERBER

Sworn to before me this
19th day of March, 1975.

SAMUEL R. RAKOSI
Notary Public, State of New York
No. 41-3199100
Qual. in Queens County, Cert. filed with
Queens Co. Clk. & Reg., N.Y. Co. Clk. & Reg.
Term Expires March 30, 1971

A-11

**Letter from William M. Hitzig, M.D.,
Dated March 12, 1975**

WILLIAM M. HITZIG, M.D.

787 Park Avenue

New York, N. Y. 10021

REgent 7-2220

March 12, 1975

TO WHOM IT MAY CONCERN:

This is to certify that Mr. Milton Blackstone is still in the convalescent phase of a very serious illness which required an urgent operation at The Mount Sinai Hospital to save his life. Since that time, he has been under my continued care with periodic visits for medications and injections at my office and at the same time remaining as an inpatient of the Florence Nightingale Nursing Home. At this time, he is still in a weakened state and requires continued observation and treatment for an additional period of at least several months during which time, despite his weakness and fatigability (for which I plan to medicate him), he is working as fast as he can within limits of his functional capacity to complete the papers required by the court.

I would be happy to furnish any additional information, should the court so desire.

Cordially yours,

/s/ WILLIAM M. HITZIG, M.D.
WILLIAM M. HITZIG, M.D.

WMH/jfm

Affidavit of Milton Blackstone, in Support of Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 Civ. 192 (CBM)

UNITED STATES OF AMERICA,

Plaintiff,

—v.—

MILTON BLACKSTONE, et al.,

Defendants.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

MILTON BLACKSTONE, being duly sworn, deposes and says:

I am the defendant in the above noted action and make this affidavit in support of my application to the Court to set aside the judgment against me on the basis of the fact that:

A) The judgment is based upon my alleged default; not on a hearing on the merits.

B) That I have a meritorious defense to the tax assessments upon which the judgment is based.

As to "A"

For sometime prior to the notice of motion for summary judgment and up until a considerable period of time subsequent to judgment against me, I was physically unable to respond to the Government's application;

Affidavit of Milton Blackstone, in Support of Motion

and therefore could not prepare or file opposition papers to demonstrate that I do not have any tax liability whatsoever.

This fact is supported by a reference to Exhibit I, attached hereto and made a part hereof which demonstrates that the papers were mailed to my attention "pro se" c/o Florence Nightingale Nursing Home, 1760 Third Avenue, New York, N.Y.

I was a patient in that institution at the time and just prior thereto had undergone very critical operations which completely incapacitated me.

As to "B"

The merits of my defense against the tax assessments and the judgments thereon are based upon incontrovertible proof and evidence which demonstrate that I have no tax liability to the Government; for the years 1958, 1959, 1960, 1961 and 1962.

My tax returns for the years 59, 60, 61 and 62 (Exhibit II) show overpayments to the Government and, therefore, there could be no tax liability.

Exhibit III is my tax return for 1958, and any stipulated judgment obtained thereon was without any authority from me, insofar as I had no tax liability for that year either. Whatever petition was filed in that matter was not verified by me and could not have been a basis for a proper judgment against me.

I have applied to the Tax Court for a copy of the Government's records upon which my alleged tax liability has been based, and upon which a judgment was entered against me; but, Mr. Frank Cantrell, Assistant Clerk has advised me that the only record they have of the

Affidavit of Milton Blackstone, in Support of Motion

case is the decision of the Court attached hereto and marked Exhibit IV.

Since there are no supporting records or evidence in the case to support the judgment; surely, then, there could be no valid tax liability on my part. Additionally, my tax records prove that I have no tax liability, as I am prepared to fully demonstrate, and, I am also prepared to show by documentary evidence that no one ever appeared on my behalf with my authority or otherwise at any tax hearing on the merits; in order to contest the assessments.

My income tax assessments are based upon activities as a shareholder and officer of a business enterprise known as Ramrod Productions Inc., in which I had an equal interest with Eddie Fisher.

During the years 1959, 1960 and 1961 the business of the corporation was affected adversely by reason of Eddie Fisher's marriage to Elizabeth Taylor in March, 1959, and his preoccupation with the filming of "Cleopatra", and, as a result your deponent's income was interrupted.

While Exhibit III reflects that a sum of \$36,000.00 was withheld and an overpayment resulted therefrom in 1958, an examination of the facts will show that I owe no tax for that year; and, on the contrary, the corporation Ramrod Productions, Inc., is due and owing substantial refunds from the Government for the years in which deficiencies are claimed by the Government against defendant.

Exhibit V attached hereto and made a part hereof is the contract of partnership of deponent in Ramrod Productions Inc., and, by its terms, any breach thereof is subject to arbitration.

Affidavit of Milton Blackstone, in Support of Motion

Your deponent has prepared a demand for arbitration concerning his wages and the breach of the aforesaid contract, and submitted herewith as Exhibit VI is the said demand.

Heretofore, by reason of his absence from the State of New York, a demand for arbitration could not have been served upon Eddie Fisher.

A deposition dated March 8, 11, 15, 1968 filed in the United States District Court covers much of the matters relevant to this inquiry (Exhibit VII) and George G. Kilarjian, of counsel to Rassner & Rassner, my attorneys, who appeared therein has consented to interpose the aforesaid vital matters for the Court's consideration in the reconsideration of the judgment entered against me June 19, 1975 in order that your deponent may be provided an opportunity to present the true facts to this Honorable Court in the interests of justice and equity which clearly show no tax liability whatsoever on your deponent's part to the Government.

Following the aforesaid deposition of your deponent the action was dismissed by stipulation between counsel for the parties (see Exhibit VIII).

/s/ MILTON BLACKSTONE

.....
MILTON BLACKSTONE

Sworn to before me this
11th day of August, 1975.

GEORGE G. KILARJIAN
Notary Public, State of New York
No. 41-7260155
Qualified in Queens County
Commission Expires March 30, 19

AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

Marian J. Bryant being duly sworn,
deposes and says that she is employed in the Office of the
United States Attorney for the Southern District of New York.

That on the
two
she served ~~a~~ copy of the
within Plaintiff-Appellee's Brief
15th day of April, 1976

by placing the same in a properly postpaid franked envelope addressed:

Milton Blackstone
350 Broadway
New York, New York 10013

And deponent further says s he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Sworn to before me this

15th day of April, 1976

Barply See

RALPH I. LEE
Notary Public, State of New York
No. 41-2292838 Queens County
Term Expires March 30, 1977